BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY GLEESON, Jr.	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,232
BFI WASTE SYSTEMS	)	
Respondent	)	
AND	)	
	)	
INSURANCE CO. STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from the March 29, 2001 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

Judge Clark granted claimant's request for medical treatment and authorized Allyson A. Hatfield, M.D., to be claimant's treating physician. Claimant alleges he injured his low back while working for respondent from 1999 through January 24, 2000, his last day of work. Respondent denies claimant's injury is work related. Claimant suffers from a congenital back problem and, in addition, suffered a previous low back injury while jet skiing in 1995. Respondent contends that claimant's current condition and need for medical treatment is a direct and natural consequence of claimant's congenital problem and/or his previous injury. Claimant counters that his current condition and need for medical treatment is the result of a work-related aggravation that is compensable as a new accident and injury. Therefore, the issue is whether claimant's current need for medical treatment for his low back condition is due to an accidental injury that arose out of and in the course of claimant's employment with respondent. Respondent also raises issues concerning timely notice, written claim and the payment of past medical expenses.

FINDINGS OF FACT

1. Claimant suffers from dwarfism, a congenital condition that, *inter alia*, affects the spine.

2. Claimant worked for respondent and its predecessor companies about 10½ years. His job duties as lead man in the container repair shop included stacking carts that weighed approximately 40 to 50 pounds.

3. Claimant was provided assistance at work whenever his back was bothering him and he requested it. When asked in 1999 by respondent's Vice President, Jim Spencer, whether his back symptoms were work related, claimant said they were not. Respondent contends the first knowledge it had that claimant was relating his condition to work was on January 16, 2001, when it received the written claim from claimant's attorney. Claimant counters that in 1995 or 1996 he told the shop manager, Don Stuhlsatz, that he had a back injury.

4. On January 24, 2000, claimant stopped working for respondent because of back pain and numbness into his legs. Claimant alleges his symptoms were worsened by performing his regular job duties for respondent. When he quit, claimant said it was due to arthritis and applied for long term disability benefits through his employer. On the application form claimant represented that his condition was not work related, but rather was a lifelong condition. The form also indicates that claimant did not intend to file a workers compensation claim. Claimant submitted his medical bills to his personal health insurance carrier, indicating again that he did not consider his condition to be work related.

5. The record shows claimant has had back problems since at least 1991. In 1995 claimant sought medical treatment from Dr. Richard B. Lies. Dr. Lies' office notes indicate that he attributed claimant's symptoms to claimant's dwarfism. In addition, medical records believed to be of Dr. Bernard Poole, indicate claimant was having complaints of back pain radiating into his legs in 1995.

6. An MRI performed in 1996 showed congenital spinal stenosis throughout the entire lumbar spine with disc space narrowing and disc bulging at L1-2, L2-3, L3-4 and L4-5. Another MRI performed in September of 2000 had similar findings which were essentially unchanged from the previous study.

7. Claimant introduced a large number of medical records as exhibits to the preliminary hearing record. But claimant does not refer the Board to any medical opinion that attributes claimant's condition to his work. The Board's review of the exhibits likewise fails to disclose such an opinion. Claimant's personal treating physician is Allyson A. Hatfield, M.D. In a letter to claimant's counsel dated March 12, 2001, Dr. Hatfield opined:

> You have asked questions regarding Jerry's back condition. His MRI demonstrated congenital spinal stenosis throughout the lumbar spine and disc bulging at L1-2, L2-3, L3-4, and L4-5. The bulging discs may relate or may not relate to his activity. As he has congenital back problems and the multiple levels would indicate a predisposition for herniation versus a traumatic herniation. As you note the major changes are congenital and

> would likely render Jerry unable to lift without regards to his activity level. He has other family members with the same problems and they too are disabled. When a person has back pain, they often notice increased pain with certain activities. I had Jerry limit some of his lifting at times, in order to minimize his pain. I also have tried to maintain his activity level to limit further deterioration, so the balance of his physical activity level has been a difficult one.
>
> The pain going down into his legs is a deterioration in his condition and further limited his aboility [sic] to be on is [sic] feet and to walk for significant distances.
>
> I have not seen Jerry since you wrote this letter to me February 22, 2001 and now. I am unable to relate these details to the specific job requirements he had at BFI. Also, I am not an occupational medicine physician who might take a different perspective.[1]

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

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[1] Claimant's Exhibit 2 to the Transcript of March 13, 2001 Preliminary Hearing.

[2] K.S.A. 44-510(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[3] K.S.A. 44-508(g). *See also In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] Brobst v. Brighton Place North, 24 Kan. App. 2d 766,771, 955 P.2d 1315 (1997).

[5] Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

affliction.[6] The record in this case, however, fails to prove that the work claimant performed for the respondent caused an aggravation of his degenerative or osteoarthritic condition. An injury that arises only from a personal condition of the employee, with no other factors as a cause, is not compensable.[7]

In Boeckmann v. Goodyear Tire & Rubber Co., 210 Kan. 733, 504 P.2d 625 (1972), the Kansas Supreme Court denied workers compensation benefits, finding Mr. Boeckmann's arthritic condition progressively worsened regardless of his activities. The Court said:

> . . . there is no evidence here relating the origin of claimant's disability to trauma in the sense it was found to exist in Winkelman. No outside thrust of traumatic force assailed or beat upon the workman's physical structure as happened in Winkelman.[8]

The Board finds that claimant has failed to prove that he suffered a work-related aggravation of his preexisting condition beginning in 1999 and through his last day worked on January 24, 2000, as alleged. Absent an aggravation that is a new accident under the Workers Compensation Act, claimant's current condition is not compensable. Based upon the record compiled to date the Board finds claimant's present condition is a natural progression of his preexisting nonwork-related condition. Therefore, the ALJ's decision to award preliminary benefits should be reversed. Because of this conclusion, the Board does not reach the remaining issues.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[9]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge John D. Clark on March 29, 2001, should be, and the same is hereby, reversed and benefits are denied.

IT IS SO ORDERED.

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[6] Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976); Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[7] Bennett v. Wichita Fence Co., 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[8] Boeckmann at 736.

[9] K.S.A. 44-534a(a)(2).

Dated this ____ day of June 2001.

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Kim R. Martens, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director